FILED
981743 APR 28 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MCM PARTNERS, INC.,

Petitioner,

v.

ANDREWS-BARTLETT & ASSOCIATES, INC., doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON, and, GES EXPOSITION SERVICES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ANTHONY S. DIVINCENZO
Counsel of Record
CAMPBELL & DIVINCENZO
55 West Monroe Street
Suite 3460
Chicago, Illinois 60603
(312) 443-1915

TERRENCE M. JORDAN
20 North Wacker Drive
Suite 1900
Chicago, Illinois 60601
(312) 346-2468

KENNETH A. JENERO
MCBRIDE, BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5790

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

6598

QUESTIONS PRESENTED FOR REVIEW

1. Whether a release applied to bar a civil action under §1 of the Sherman Act challenging a continuing conspiracy in unreasonable restraint of trade is void as against public policy?
2. Whether a new post-release agreement is necessary to constitute a new post-release violation of §1 of the Sherman Act?
3. Whether a release applied to bar a civil action challenging a continuing violation of the Racketeer Influenced and Corrupt Organizations Act is void as against public policy?

LIST OF PARTIES

Plaintiff: MCM Partners, Inc.
(no parent or subsidiaries)

Defendants: Andrews-Bartlett & Associates, Inc.
Andrews-Bartlett Exposition Services
GES Exposition Services, Inc.
(Viad Corp., directly or indirectly, owns greater than 10% of the stock of GES Exposition Services, Inc., and Andrews-Bartlett & Associates, Inc.)

Harold Bartlett
Bonnie Aaron
Freeman Decorating Company*
Doug Van Ort*
David Leithleiter*

---

* Dismissed from action in the United States Court of Appeals for the Seventh Circuit pursuant to settlement reached after filing appeal.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 6

1. The court below erred in holding that a civil action under §1 of the Sherman Act challenging a continuing conspiracy in restraint of trade was barred by a prior release 6

2. The court below erred in holding that a new post-release agreement was necessary to constitute a new post-release violation of §1 of the Sherman Act 8

3. The court below erred by holding that an ongoing violation of RICO can be released 10

CONCLUSION 11

APPENDIX

APP. PAGE

Opinion of the United States Court of Appeals for the Seventh Circuit entered November 17, 1998 1

Judgment of the United Stated States Court of Appeals for the Seventh Circuit entered November 17, 1998 11

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois entered May 28, 1997 12

Judgment of the United States District Court for the Northern District of Illinois entered May 28, 1997 45

Order of the United States Court of Appeals for the Seventh Circuit entered January 28, 1999 47

TABLE OF AUTHORITIES

Cases PAGE(S)

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 9

Main Line Theatres, Inc. v. Paramount Pictures Film Distributing Corp., 298 F.2d 801 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962) 7

Marketing Assistance Plan v. Associated Milk Producers, Inc., 338 F.Supp. 1019 (D.C. Tex. 1972) 7

Redel's, Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974) 7

Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3rd Cir. 1975) 7

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) 9

Statutes

§1 Of The Sherman Act (15 U.S.C. §1) 2

Racketeered Influenced And Corrupt Organizations Act, (18 U.S.C. §1962) 2-3

PETITION FOR WRIT OF CERTIORARI

MCM Partners, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 17, 1998.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is reported at 161 F.3d 443 (7th Cir. 1998). The underlying judgment of the trial court is reported at 1997 WL 306577 (N.D. Ill. 1997). The opinions of the District Court and the Court of Appeals are reproduced in the Appendix to this Petition.

JURISDICTION

On November 17, 1998, the United States Court of Appeals for the Seventh Circuit issued its decision affirming the judgment entered by the trial court. On January 28, 1999, the United States Court of Appeals for the Seventh Circuit denied Appellant's Petition for Rehearing with Suggestion of Rehearing *En Banc*. Jurisdiction in this Court is based on 28 U.S.C. §1254(1).

STATUTES INVOLVED

§1 Of The Sherman Act (15 U.S.C. §1)

Contracts, Combinations and Conspiracies in Restraint of Trade

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Racketeered Influenced And Corrupt Organizations Act (18 U.S.C. §1962)

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the

open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which effect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

STATEMENT OF THE CASE

Defendant, Andrews-Bartlett & Associates, Inc., d/b/a Andrews-Bartlett Exposition Services (hereinafter collectively referred to with all other defendants as "A-B") is an exhibition contractor in the business of putting on trade shows at McCormick Place, the largest trade show venue in Chicago, Illinois, and at other venues. Plaintiff, MCM Partners, Inc. ("MCM"), was a company which leased forklifts and other equipment to exhibition contractors which put on trade shows at venues such as McCormick Place in Chicago, Illinois. MCM competed with other companies, including O.G. Services ("O.G."), a company owned and operated by a steward of the Teamsters Union, that also leased equipment to exhibition contractors for use at McCormick Place.

On January 17, 1992, A-B agreed to use MCM to provide forklifts and other equipment for two trade shows to be held at McCormick Place. A-B subsequently issued two purchase orders to MCM covering equipment for use during the National Restaurant Association and Food Marketing Institute shows.

Subsequently, representatives of A-B met with representatives of Local 714 of the Teamsters to discuss A-B's forklift rentals at McCormick Place. At that time A-B stated that it was not satisfied with O.G. and would be using MCM to supply equipment for those two shows. A-B confirmed that discussion by letter of April 8, 1992, but solicited the Teamster's input as to equipment rentals for future trade shows. That very letter indicated that the Teamsters agreed to labor concessions in exchange.

On April 17, 1992, Mr. Bartlett of A-B met first with representatives of the Teamsters and then with Mr.

Boscarino, the owner and operator of O.G. After their meeting, O.G. offered A-B a 10% discount on total rentals for the year to be paid at the end of the year if A-B rented equipment solely from O.G. A-B would not receive the discount if it used MCM or any supplier other than O.G. After these meetings, A-B canceled the two outstanding MCM purchase orders. On April 17, 1992, A-B wrote MCM stating that the purchase orders were being canceled due to an "advance agreement" with O.G.

On April 22, 1992, MCM sued O.G. and others (but not A-B), asserting that defendants had violated RICO and tortiously interfered with MCM's business by causing A-B to cancel the purchase orders. No antitrust claims were alleged in that suit. On April 24, 1992, a settlement was reached which included A-B's agreement to honor the two outstanding purchase orders. Nevertheless, at that time, Mr. Bartlett informed his subordinates at A-B that O.G. was to remain A-B's exclusive supplier pursuant to the Agreement he had reached with O.G.

In early May, 1992, MCM executed a settlement agreement and release ("Release"). A-B agreed to honor the original purchase orders issued to MCM for the National Restaurant Association and Food Marketing Institute shows. MCM agreed to release A-B from any and all claims arising before April 25, 1992, including those alleged in the complaint, as well as those relating to the two purchase orders and the January 17, 1992, letter to MCM, which were attached as exhibits to the settlement document.

In July, 1992, MCM received a letter from an attorney representing A-B instructing it to have no further

contract with A-B, except through counsel. Pursuant to the April 17, 1992, agreement, A-B did not rent from MCM after June, 1992, until GES Exposition Services (A-B's successor) used MCM in late 1994. However, A-B and GES continued to rent from O.G. through at least 1996.

Following its continued exclusion, MCM filed a lawsuit against A-B alleging violation of the antitrust and RICO statutes. The district court granted summary judgment against MCM finding that the release previously executed by MCM in connection with the prior lawsuit barred MCM's claims, which the Court concluded were based only on pre-Release conduct. On November 17, 1998, the Seventh Circuit affirmed.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not been, but should be settled by this Court, and the Courts below have decided an important question of federal law in a manner that conflicts with relevant decisions of this Court:

1. The court below erred in holding that a civil action under §1 of the Sherman Act challenging a continuing conspiracy in restraint of trade was barred by a prior release.

MCM challenged the actions of A-B as an ongoing conspiracy in unreasonable restraint of trade. The courts below held that MCM's cause of action was barred by the release executed in connection with the prior non-antitrust litigation. While apparently accepting that a release is void as against public policy if it

purports to release future antitrust violations, the courts below attempted to distinguish this case by holding that no "future" violations of the antitrust laws were involved. The Seventh Circuit held, without citation to any authority, that MCM was required to prove "a new post-Release agreement" in order to establish a cause of action not barred by the Release. Consequently, the Seventh Circuit rejected MCM's position that the Release was void as against public policy because it allowed a continuation of a conspiracy in unreasonable restraint of trade. The Court below has, therefore, held that a release is valid even if it permits a continuing conspiracy in unreasonable restraint of trade to continue. This holding presents a important federal question which has not previously been settled by this Court.

Numerous federal courts have now clearly held that a purported release of future antitrust violations is void as against public policy. *Main Line Theatres, Inc. v. Paramount Pictures Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 895-97 (3rd Cir. 1975); *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); and *Marketing Assistance Plan v. Associated Milk Producers, Inc.*, 338 F.Supp. 1019 (D.C. Tex. 1972). Underlying these decisions is a recognition that private enforcement of the antitrust laws is an important element of the legislative scheme of preventing unreasonable restraints of trade. As the court in *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974), cogently explained, "[a] right conferred on a private party by federal statute, but granted in the public interest to effectuate legislative policy, may not be released if the legislative policy

would be contravened thereby". Simply put, to absolve a party from future violations of the antitrust laws would permit a restraint of trade which would adversely impact not only the parties to the release, but the public as well.

The same reasoning applies with equal force to continuing conspiracies in unreasonable restraint of trade. To absolve the parties to a conspiracy entered into prior to a release from liability for continuing the conspiracy after the release not only impacts the parties to the release but the public as well. There is simply no difference between a future violation and a continuing violation for these purposes. The anti-competitive impact is suffered even if no new post-release agreement is proven. The continuation of the pre-release conspiracy or agreement is sufficient to create the adverse impact upon competition. The courts below failed to recognize that fact and have thereby weakened the legislative policy protecting competition embodied in §1 of the Sherman Act. This Court should address this issue to ensure that the Sherman Act's purpose of protecting competition is fulfilled.

2. The court below erred in holding that a new post-release agreement was necessary to constitute a new post-release violation of §1 of the Sherman Act.

A second significant error in the decision below is the failure of the court to recognize that a new cause of action under §1 of the Sherman Act occurs when an act in furtherance of a conspiracy injures a plaintiff. The Seventh Circuit's insistence upon proof of a new agreement to create a new post-release cause of action under

the Sherman Act rejects this well-established premise. For that reason, the decision below conflicts with the relevant and controlling decisions of this Court.

This Court has always adhered to a single understanding of the nature of an ongoing conspiracy in unreasonable restraint of trade. That understanding is premised upon the conclusion that each time a party is injured by an act in violation of antitrust laws, a new cause of action accrues. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), this Court defined the fundamental nature of continuing antitrust violations. In determining when an antitrust action accrued for purposes of the statute of limitations, this Court explained that

> In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Id. at 338. In *Zenith*, the conspiracy was formulated substantially more than five years before the period for which damages were sought. Nonetheless, the Court held that Zenith's action was not time barred because damages were suffered within four years of filing suit.

Similarly, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1968), this Court held that the damages incurred as a result of a supplier's illegal lease-only policy could be recovered even though the initial injury resulting from the illegal acts was suffered, many years before the lawsuit was filed.

There, the continued application of the lease-only policy inflicted "continuing and accumulating" harm, the gravamen of a continuing conspiracy in restraint of trade.

The Seventh Circuit decision has altered and conflicts with this fundamental understanding of the nature of an ongoing conspiracy in violation of the antitrust laws. The decision below undercuts the controlling precedent by holding that the existence of a cause of action now depends on the timing of the formation of the conspiracy and not the time the damages are suffered. This Court should address this issue to reaffirm that in an ongoing conspiracy, a new cause of action accrues each time an act causing injury occurs, and the date of the initial formation of the conspiracy is irrelevant.

3. The court below erred by holding that an ongoing violation of RICO can be released.

On a question of first impression, the Seventh Circuit held that an ongoing violation of RICO can be released. However, the same reasoning that governs antitrust actions should govern RICO actions.

To allow the release of ongoing and future violations of RICO would be contrary to public policy. Specifically, the predicate acts involved in this case, *i.e.*, violations of the Taft-Hartley Act, continued after the release. The Taft-Hartley violations arose each time A-B contracted with O.G. to rent equipment. Those acts caused the injury suffered by MCM.

As with the antitrust laws, RICO protects the public at large. To absolve defendants by giving effect to the release would jeopardize that interest by insulating defendants' continuing RICO violations. This Court should

address this important issue to preserve the legislative scheme of enforcement embodied in RICO.

CONCLUSION

This case presents important federal questions related to the enforcement of the antitrust laws and RICO. The decision below renders the Sherman Act and RICO impotent to prevent conspiracies in violation of those statutes from being continued once a private action has been settled. This Court should address these questions to preserve the ability of private plaintiffs to continue enforcing the law in furtherance of clear legislative policy.

Respectfully submitted,

ANTHONY S. DIVINCENZO
Counsel of Record
CAMPBELL & DIVINCENZO
55 West Monroe Street
Suite 3460
Chicago, Illinois 60603
(312) 443-1915

TERRENCE M. JORDAN
20 North Wacker Drive
Suite 1900
Chicago, Illinois 60601
(312) 346-2468

KENNETH A. JENERO
MCBRIDE, BAKER & COLES
500 West Madison Street
Chicago, Illinois 60661
(312) 715-5790

Attorneys for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2610

MCM PARTNERS, INCORPORATED,

Plaintiff-Appellant,

v.

ANDREWS-BARTLETT & ASSOCIATES, INCORPORATED, doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5641—**Paul E. Plunkett**, *Judge*.

ARGUED FEBRUARY 26, 1998—DECIDED NOVEMBER 17, 1998

Before BAUER, HARLINGTON WOOD, JR., and FLAUM, *Circuit Judges*.

HARLINGTON WOOD, JR., *Circuit Judge*. MCM Partners, Incorporated ("MCM") filed this suit against Andrews-Bartlett & Associates, Incorporated, Harold (Butch) Bartlett, Bonnie Aaron, and GES Exposition Services, Inc.[1] (collectively "Andrews-Bartlett") alleging violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Racketeer

---

[1] In 1993, Andrews-Bartlett & Associates, Incorporated, merged with GES Exposition Services, Inc.

Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962 (c) and (d). MCM contends that Andrews-Bartlett acted illegally by refusing to rent equipment from MCM. The district court granted summary judgment to Andrews-Bartlett. MCM appeals.

I. BACKGROUND

This case centers around the rental of moving equipment, such as forklifts and scooters, to exhibition contractors at Chicago's McCormick Place. Andrews-Bartlett was a national exhibition contractor which often was employed to orchestrate trade shows at McCormick Place. MCM and O.G. Services ("O.G.") were in the business of leasing moving equipment to exhibition contractors. The exhibition contractors would then use the rental equipment to set up the shows. MCM did not own its own equipment; instead, it acted as a broker, providing contractors with equipment it rented from National Truck Lift.

Prior to April 1991, only two companies, O.G. and AIM Industrial Lift Truck, supplied forklifts and other moving equipment to exhibition contractors at McCormick Place. In April 1991, MCM began to compete with O.G. and AIM for the McCormick Place business. In the fall of 1991, O.G. purchased AIM, leaving MCM as O.G.'s sole competition at McCormick Place.

In January 1992, Andrews-Bartlett sent a letter to MCM agreeing to use MCM as its primary supplier of gas scooters at McCormick Place for 1992 and to have MCM supply half of its equipment needs for both the National Restaurant Association Show and the Food Marketing Institute Show and all of its equipment for the "NSGA East Building" and the Siggraph Show.[2] Andrews-Bartlett then is-

---

[2] Andrews-Bartlett disputes that the January letter constituted a binding agreement and asserts that the document was merely a letter of intent.

sued two purchase orders to MCM for rental equipment for the Restaurant and Food Marketing shows.

In February 1992, Nick Boscarino, an employee of O.G., sent a letter to Andrews-Bartlett which mentioned O.G.'s past service to Andrews-Bartlett and expressed a desire that O.G. continue to be Andrews-Bartlett's "official" fork-lift provider. In March 1992, Francis Sheridan, the general manager of Andrews-Bartlett's Chicago office, informed Boscarino that Andrews-Bartlett had agreed to rent some equipment from MCM. MCM asserts that Boscarino then told Sheridan that Bill Hogan, a high-ranking local official in the International Brotherhood of Teamsters, was "not going to like" the fact that Andrews-Bartlett was doing business with MCM.

Sheridan met with Hogan and other Teamster representatives in early April 1992 to discuss equipment rental for McCormick Place. Sheridan told the men that Andrews-Bartlett was not satisfied with O.G. and would begin renting equipment from both O.G. and MCM. They also discussed the terms of Andrews-Bartlett's use of certain labor at McCormick Place.[3]

On April 17, 1992, during a visit to Chicago, Harold Bartlett, the president of Andrews-Bartlett, met with Boscarino. Boscarino informed Bartlett that, if Andrews-Bartlett used O.G.'s services exclusively, O.G. would give Andrews-Bartlett an end-of-the-year rebate equal to 10% of Andrews-Bartlett's total rentals for the year. After this meeting, Andrews-Bartlett sent a letter to MCM stating that the two purchase orders were being canceled due to an "advance agreement" with O.G.

---

[3] MCM contends that a letter of confirmation sent after this meeting shows that Hogan agreed to grant Andrews-Bartlett certain labor concessions. Andrews-Bartlett disputes this interpretation.

On April 22, 1992, MCM filed a lawsuit against O.G., several of its employees, and several members of the local branch of the Teamsters (the "O.G. Defendants"), alleging that O.G. conspired with Andrews-Bartlett and another exhibition contractor, Freeman Decorating Company, to monopolize the rental equipment market at McCormick Place, thereby excluding MCM as a competitor in the market. Several days later, the parties entered into a settlement agreement. In conjunction with this settlement, on May 5, 1992, MCM and Andrews-Bartlett, which was not a party to the first lawsuit, executed a Settlement Agreement and Release ("Release"). Under the Release, Andrews-Bartlett agreed to honor the two original purchase orders issued to MCM. In exchange, MCM agreed to release Andrews-Bartlett from any and all claims arising before April 25, 1992. Subsequently, both parties performed under the two purchase orders. However, Andrews-Bartlett did not rent any additional equipment from MCM from July 1992 until October 1994.

In August 1992, MCM filed a second lawsuit against the O.G. Defendants, Andrews-Bartlett, and Freeman Decorating. This complaint alleged violations of RICO and the antitrust laws. In November 1992, MCM voluntarily dismissed the O.G. Defendants. Andrews-Bartlett and Freeman Decorating moved to dismiss MCM's complaint. The district court granted these motions, and MCM appealed to this court. In *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967 (7th Cir. 1995), we vacated the district court's dismissal of MCM's Sherman Act Antitrust and RICO claims and remanded the matter for further proceedings. After discovery, Andrews-Bartlett and Freeman Decorating filed separate motions for summary judgment. Andrews-Bartlett argued that MCM's claims were barred by the Release and, alternatively, that MCM lacked evidence to support its claims. The district court granted Andrews-Bartlett's motion, holding that MCM's claims based on pre-Release conduct were barred by the Release and that MCM failed

to provide any evidence of post-Release violations. MCM filed a timely appeal.[4]

II. ANALYSIS

We review the district court's grant of summary judgment *de novo*. *Porter v. Whitehall Lab., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993). We will affirm if the record, viewed in the light most favorable to the non-moving party, reveals that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Paragraph four of the Release states:

> Andrews-Bartlett, as consideration for this Settlement Agreement, agrees to utilize M.C.M. as supplier of forklifts and scooters for the Supermarket Industry (FMI) '92 Show and the National Restaurant Association Show and agrees to pay M.C.M. all in accordance with the terms of the Purchase Orders attached hereto as Exhibits 1 and 2.

In exchange, MCM agreed to release Andrews-Bartlett from all claims:

> [A]rising out of any matter, cause or thing from the beginning of the world to April 25, 1992 including, but not limited to, any and all claims, causes of action,

---

[4] Freeman Decorating was dismissed from this action pursuant to a settlement reached after the filing of the current appeal. Therefore, our analysis is limited to MCM's claims against Andrews-Bartlett.

> liability or damages arising out of the acts, transactions, contracts, occurrences or events alleged in the pleadings filed in the Litigation and further including, but not limited to, claims and/or allegations allegedly arising from Exhibits 1 and 2 and the January 17, 1992 Letter attached hereto as Exhibit 3.

MCM asserts that the Release is unenforceable and, therefore, it cannot bar the claims against Andrews-Bartlett in the present suit. MCM's argument is two-fold. First, MCM contends that a condition precedent to the formation of the Release was not fulfilled. Secondly, MCM asserts that the Release is void as against public policy. We address each argument in turn.

MCM argues that the Release is unenforceable because a condition precedent to its formation was not fulfilled. Under Illinois law, a condition precedent to the formation of a contract is one that must be met before a contract becomes effective. *Hardin, Rodriguez & Boivin v. Paradigm Ins.*, 962 F.2d 628, 633 (7th Cir. 1992) (citing *Kilianek v. Kim*, 548 N.E.2d 598, 601 (Ill.App.Ct. 1989)). Both parties must agree to a condition precedent for it to be considered binding. *Id.* (citing *Wasserman v. Autohaus on Edens, Inc.*, 559 N.E.2d 911, 916 (Ill.App.Ct. 1990)). MCM bears the burden of clearly establishing that the parties intended to create a condition precedent at the time the contract was made. *See Wasserman*, 559 N.E.2d at 916. MCM asserts that, as a condition precedent to the formation of the Release, the parties agreed that MCM would be allowed to compete fairly for Andrews-Bartlett's business. This condition was not set out in the Release; however, MCM argues that extrinsic evidence establishes the parties' agreement on this condition. Specifically, MCM points to the transcript of a hearing before the district court on April 24, 1992 and the deposition testimony of MCM's president, Frank Mugnolo, as evidence of this condition precedent.

On April 24, 1992, the district court held a hearing on the settlement of the initial suit by MCM against O.G.

MCM mischaracterizes a portion of the hearing transcript in an attempt to prove that fair competition was a condition precedent to the execution of the Release. Considered in context, it is clear that fair competition was not set forth as a part of the agreement at the settlement hearing. At the beginning of the hearing, the attorneys for O.G. and MCM outlined the terms of the settlement agreement. They stated that, as a part of the settlement, Andrews-Bartlett had agreed to allow MCM to fulfill the two purchase orders. An attorney representing Sheridan then stated that it was his understanding that MCM agreed not to file litigation based on the January letter contract. After the settlement terms were recited on the record, the district judge stated "if anybody here feels the agreement that has been recited is not the agreement, it's time now to speak or forever hold your peace. It's a marriage that is being performed," to which there was no response. At this point, there had been no mention of a fair competition agreement. Fair competition was mentioned only at the close of the hearing when the district judge said:

> All right, and then the only question I have, and I'm reluctant to ask it because I don't want to derail something you've put together, but I'll ask it anyway: What happens after Purchase Orders 20 and 21, which are May and June, or whatever they are, for the rest of the year? Everybody is just free to compete provided they compete fairly with one another? That's the idea?

The attorneys for O.G. and MCM assured the judge that this was the case. Even considered in the light most favorable to MCM, the hearing transcript does not suggest that Andrews-Bartlett agreed to fair competition as a condition precedent to formation of the Release.

Similarly, the Mugnolo deposition does not raise a genuine issue of material fact. When asked whether there was any obligation set forth in the Release that Andrews-Bartlett had not performed, Mugnolo answered that Andrews-Bartlett did not fulfill the purchase orders because

it did not pay the rental taxes or damages assessed by MCM. Additionally, Mugnolo testified "Butch [Bartlett] was supposed to meet with me so we could solicit business and be treated on the same playing level. And he was supposed to give me a fair shot. In fact, Mr. Carey [Mr. Sheridan's attorney] I believe testified to Judge Plunkett, 'Yes, sir, they'll be given a fair shot.' And Carey also said that Butch would meet with me."[5] Significantly, Mugnolo did not testify that the Release was not to become effective unless the parties agreed to fair competition. At most, Mugnolo's testimony establishes that fair competition was a condition precedent to performance of the contract. Extrinsic evidence may be admissible to establish the existence of a condition precedent to the formation of a contract. However, when the language of the contract is unambiguous, the parol evidence rule prevents the consideration of extrinsic evidence to show the existence of a condition precedent to performance. *Althoff Indus., Inc. v. Elgin Med. Ctr.*, 420 N.E.2d 800, 803-04 (Ill.App.Ct. 1981). The Release is unambiguous, a fair competition clause easily could have been included, and MCM does not explain why one was not. We cannot allow MCM to use extrinsic evidence to alter unilaterally the terms of agreement. On the facts in the record, MCM cannot establish that fair competition was a condition precedent to the formation of the Release. MCM's unfulfilled condition precedent argument fails.

Alternatively, MCM contends that the Release is void as against public policy because it serves to release Andrews-Bartlett from future violations of RICO and the antitrust laws. On its face, the Release does not attempt to release claims for future violations; it expressly discharges only the claims that MCM may have against Andrews-Bartlett "arising out of any matter, cause or thing from the begin-

---

[5] This testimony is contradicted by the transcript of the settlement hearing.

ning of the world to April 25, 1992." Nevertheless, MCM argues that the district court applied the Release to bar claims arising from future violations.

MCM asserts that, in April 1992, as a result of a series of threats and concessions by the Teamsters, Andrews-Bartlett and O.G. entered into an agreement to exclude MCM from doing business at McCormick Place. While MCM concedes that this agreement occurred before April 25, 1992, MCM argues that each act in furtherance of a conspiracy gives rise to a separate cause of action and, therefore, actionable violations based on Andrews-Bartlett's post-Release conduct exist. According to MCM, the district court incorrectly applied the Release to bar these claims. Specifically, MCM contends that Andrews-Bartlett's refusal to deal with MCM from July 1992 until October 1994, based on alleged continued adherence to the April 1992 agreement, gives rise to non-barred causes of action. However, this claim is clearly based on pre-April 25, 1992 conduct and, as such, is expressly barred by the Release. MCM then argues, in the alternative, that the April 1992 agreement was "at most a one year deal" and, thus, "the protection of the release would end when the term of that agreement ended." MCM contends that the "exclusion of MCM for a second year constituted a *new* agreement." However, MCM does not allege any facts which would establish a new agreement or even an affirmation of the 1992 agreement. In order to state a claim under § 1 of the Sherman Act, 15 U.S.C. § 1 (1997), MCM cannot rely on a mere refusal to deal. Instead, MCM must show "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *MCM Partners*, 62 F.3d at 972 n.7 (quoting *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993)). MCM has presented no facts which could support a finding that O.G. and Andrews-Bartlett entered into a new, post-Release agreement. The district court did not apply the Release to bar future antitrust claims.

MCM contends that a violation of RICO, 18 U.S.C. § 1962 (c) and (d), occurred each time that Andrews-Bartlett contracted with O.G. However, in order to state a viable cause of action under RICO, MCM must show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). The facts in the record do not support a finding of a post-Release violation of RICO. Since MCM's RICO claim is based on pre-Release conduct, the district court did not apply the Release to bar future RICO claims. The Release is valid and enforceable.

The district court properly granted Andrews-Bartlett's motion for summary judgment. MCM's claims based on pre-Release conduct are barred, and MCM fails to present any evidence of post-Release violations.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: November 17, 1998

BEFORE:

Honorable WILLIAM J. BAUER, Circuit Judge
Honorable HARLINGTON WOOD, JR., Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge

No. 97-2610

MCM PARTNERS, INCORPORATED,

Plaintiff - Appellant

v.

ANDREWS-BARTLETT & ASSOCIATES, INCORPORATED, doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON, et al.,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 92 C 5641, Paul E. Plunkett, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

App. 12

[Dated May 28, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MCM PARTNERS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	No. 92 C 5641
	)	Paul E. Plunkett,
	)	Judge
ANDREWS-BARTLETT ASSOCIATES, INC., d/b/a ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (BUTCH) BARTLETT, BONNIE AARON, FREEMAN DECORATING COMPANY, DOUG VAN ORT, DAVID LEITHLEITER, and GES EXPOSITION SERVICES, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MCM Partners, Inc. ("MCM"), sued the defendants under the Sherman Act and RICO for allegedly conspiring to keep MCM out of the business of providing material handling and personnel moving equipment for expositions at McCormick Place in Chicago. The defendants fall into two groups: the Freeman Decorating Company ("FDC") defendants, including FDC, Doug Van Ort ("Van Ort") and David Leithleiter ("Leithleiter"); and the Andrews-Bartlett Associates, Inc. ("A-B"), defendants, comprised of A-B, Harold (Butch) Bartlett ("Bartlett"), Bonnie Aaron ("Aaron") and GES Exposi-

tion Services ("GES"). Both have moved for summary judgment. For the reasons set forth in this memorandum opinion and order, the motions are granted.

Facts

I. Inadmissible Evidence Submitted by MCM

In opposing the motions, MCM has submitted a number of exhibits and other evidence that FDC and A-B challenge as inadmissible. That issue is addressed preliminarily because it determines whether that evidence is to be considered in deciding the current motions.

In deciding a motion for summary judgment, we may consider only such evidence as would be admissible at trial. *Gustovich v. AT & T Communications, Inc*, 972 F.2d 845, 849 (7th Cir. 1992). As the Seventh Circuit has explained:

> The evidence need not be in admissible *form;* affidavits are ordinarily not admissible evidence at trial. But it must be admissible in *content*, in the sense that a change in form but not in content, for example a substitution of oral testimony for a summary of that testimony in an affidavit, would make the evidence admissible at trial.

Winskunas v. Birnbaum, 23 F.3d 1264, 1267-68 (7th Cir. 1994) (emphasis in original). However, hearsay that does not fall within one of the exceptions set out in the Federal Rules of Evidence is just as inadmissible on summary judgment as it is at trial. *Eisenstadt v. Centel Corp.*, ___ F.3d ___, 1997 WL 242251, at *3 (7th Cir. May 12, 1997). Bearing these principles in mind, we address the specific exhibits at issue.

1. *Independent Review Board Report regarding Local 714 (Ex. A).* This document is 121-page report dated August 5, 1996, from an Independent Review Board ("IRB") to the president of the International Brotherhood of Teamsters. The authors of the report are not identified, and the circumstances under which it was created are not explained. In addition, MCM has attached no affidavit from a witness with personal knowledge attesting to the authenticity of the document, as required by Federal Rule of Evidence ("FRE") 901. As a result, the document is inadmissible hearsay. *See Martz v. Labor Union Life Ins. Co.*, 757 F.2d 135, 138 (7th Cir. 1985).

2. *Miscellaneous Documents (Exs. B through J and X).* These documents were originally exhibits to the IRB report. Exhibits B, C, D, F, I , J and X appear to be excerpts from sworn witness statements taken by attorneys for the IRB. However, FDC and A-B were not parties to that action, their attorneys were not present during that testimony, they had no opportunity to cross-examine the witnesses, and no other party had a motive similar to the defendants to develop the witnesses' testimony through cross-examination. (FDC Reply Br. at 4; A-B Reply Br. at 2.) In addition, MCM has made no showing that the witnesses are unavailable for deposition in this action.[1] As a result, MCM has not established that the witnesses' testimony given in another proceeding is admissible under FRE 804(b)(1)'s

---

[1] Only one of the witnesses, Vincent Siciliano, was deposed in this case. The excerpt of his deposition testimony that was submitted does not indicate that he was examined as to the substance of his prior testimony. *See* A-B Ex. 9.

exception for former testimony, and the statements remain inadmissible hearsay. And, even if they were admissible, a review of the statements indicates that none contains any factual material within the witness' personal knowledge that is relevant to this case.

The remaining exhibits that were originally attached to the IRB report are documents. One is a letter with an attachment (Ex. E), one is the articles of incorporation of Convention Cartage Systems, Inc. (Ex. G) and the last is the collective bargaining agreement between Local 714 and FDC (Ex. H). None of those documents has been authenticated, and they are therefore inadmissible hearsay. Moreover, they are wholly irrelevant to the issues in this action and are inadmissible for that reason as well.

3. *Sworn Witness Statements (Exs. O and GG).* These exhibits purport to be excerpts from sworn witness statements taken by counsel for MCM. One of them (Ex. O) is of Perry DuBose of National Lift Truck, a company that supplied forklifts and other equipment to MCM. The statement was taken prior to DuBose's deposition in this case and contains a certification (although not an attestation) by the court reporter who transcribed it that it was taken under oath. However, the excerpt does not attest that DuBose's testimony was based upon his personal knowledge on matters as to which he is competent to testify, as Rule 56(e) requires of affidavits submitted on summary judgment. In addition, the substance of much of the testimony indicates that DuBose would not be competent to testify as to it, for he frequently describes incidents occurring at McCormick Place and circumstances surrounding the equipment rental business there without indicating that

his knowledge of them was first-hand. In other instances he recites conversations with Nick Boscarino and Clifford Larson that are clearly inadmissible hearsay.

On its face DuBose's statement is hearsay, for it is an out-of-court statement offered for the truth of the matters asserted. Although FRE 801(d)(1) excludes from hearsay prior inconsistent statements by a witness as well as prior consistent statements offered to rebut a charge of recent fabrication, improper influence or motive, the statement does not fall into either category. MCM has not shown that DuBose's statement was inconsistent with his subsequent deposition testimony, and the defendants have made no claim of recent fabrication, etc., that would require rebuttal. Thus, the statement can be considered only if it falls into one of the hearsay exceptions contained in FRE 803 or 804. Because DuBose was deposed in this case, he was not "unavailable" under FRE 804, and [sic]

Alternatively, the content of DuBose's statement is irrelevant to the issues here. He testified regarding incidents in which his company's equipment, rented to MCM, was damaged at McCormick Place, allegedly by OG Services (MCM's largest competitor) or Teamsters Local 714. MCM offers the statement to show that FDC used OG Services exclusively out of fear of reprisals, including damage to its equipment. But MCM has not shown that FDC ever knew of the incidents described by DuBose. As a consequence, the statement is irrelevant.

The other statement (Ex. GG) is that of Clifford Larson. Such a statement is not explicitly included in Rule 56(c)'s recitation of evidence to be considered on sum-

mary judgment, for it is not a deposition, affidavit, interrogatory answer, pleading or admission on file. Fed. R. Civ. P. 56(c). Moreover, it lacks the indicia of reliability present in deposition transcripts and affidavits, for defense counsel were not present and had no opportunity to cross-examine Larson, it contains no certification that it was taken under oath (it has only an unauthenticated cover sheet that indicates the statement was sworn), and it contains no attestation of personal knowledge or competency to testify as to the matters addressed therein. The statement does not fall outside the category of hearsay under FRE 801(d)(1) as a prior statement by a witness, for Larson made no subsequent statement. As a result,, because it is an out-of-court statement offered for its truth, it is hearsay. It does not fall under FRE 804's exceptions to hearsay, for MCM has not shown that Larson was unavailable for deposition in this case. Finally, MCM has not argued that it falls under any hearsay exception in FRE 803. Therefore, it is inadmissible hearsay.

4. *Documents of OSHA Violations by A-B (Ex. R).* These documents relate to several purported OSHA violations by A-B. However, MCM has not authenticated the documents, and they are therefore inadmissible hearsay. In addition, the documents are irrelevant to this case, and they are inadmissible on that basis also.

II. The Parties and Other Players

MCM is in the business of renting material handling equipment, such as forklifts, and personnel moving equipment to trade show contractors at McCormick Place. It does not own its own equipment; rather, it acts

a broker, providing its customers with equipment it rents from National Lift Truck ("NLT"). MCM is owned by Frank Mugnolo ("Mugnolo"), its sole shareholder, officer, director and employee. Terrence Jordan ("Jordan") is its attorney in this action and has also worked as a commissioned salesperson for MCM; whether he is an employee is unclear. Jordan's father, Thomas Jordan ("Tom Jordan"), has also done some sales and security work for MCM. Mugnolo and the Jordans are in-laws.

FDC is the Chicago branch of a nationwide company that provides general contracting services for the convention, meeting and trade show industry. It owns some material handling and personnel moving equipment, including 40-50 forklifts and 15-20 flatbed scooters. In 1991 and 1992 (part of the relevant time period for this case), Leithleiter was its Drayage Manager. As such he oversaw show site preparation at McCormick Place and other locations and ordered material handling and personnel moving equipment for trade shows and conventions there. He is currently the Director of Operations for the Corporate Sales Group. Van Ort is the General Manager of FDC's Chicago office and was formerly Leithleiter's boss.

A-B is the Chicago office of one of FDC's competitors; it also handled a variety of shows at McCormick Place. In 1993 it merged into GES. Prior to 1993, Bartlett was the president and a shareholder of A-B; after the merger he was an employee of GES. Aaron, who is his sister, was an employee and shareholder of A-B and an employee of GES. At times relevant to this action, A-B employed Vincent Siciliano ("Siciliano") as Material Handling Supervisor, where he supervised the set-up

and move-out of shows, and later as Material Handling Manager, where he issued purchase orders for equipment, among other things. It also employed Thomas Gilmore ("Gilmore") as Vice President of Production of A-B's nationwide furniture and decorating operations, and Francis Sheridan ("Sheridan") as General Manager of the Chicago office, overseeing its day-to-day operations.

One of MCM's largest competitors (if not the largest) is O.G. Service Corporation ("OG"), which rents material handling and personnel moving equipment to companies like FDC and A-B for trade shows and conventions at McCormick Place and other locations. OG owns the majority of the equipment it provides, although on occasion it must rent additional equipment to fill a large order. OG has some connection (apparently as employer) with Nick Boscarino ("Boscarino"), who used to be a steward for Teamsters Local 714 ("Local 714") at the Rosemont Exhibition Center. OG and Boscarino were formerly defendants in this action; MCM has voluntarily dismissed them.

FDC, A-B, GES and OG had collective bargaining agreements with Local 714, which was run by William Hogan, Jr. ("Hogan"). Neither MCM nor NLT employ union members.

Other competitors of MCM include AIM Industrial, Ltd. ("AIM"), which occasionally supplied equipment to FDC. OG purchased AIM in an asset sale in the fall of 1991. And finally there is First Access ("First Access'), which has also supplied equipment to FDC, and which is still in operation today.

II. The Plot

A. An Overview

MCM alleges that it was unable to compete in the material handling and personnel moving equipment rental business at McCormick Place because OG, backed by Local 714 and Hogan through Boscarino, threatened FDC and A-B with labor disputes and destruction of property if they placed any business with MCM. It accuses FDC and A-B of agreeing with this plan (albeit under duress). Because the scenarios regarding FDC and A-B are slightly different, they are set forth separately below.

B. FDC

MCM first contacted FDC in April 199 1, about one month after MCM entered the equipment rental business. Jordan contacted Leithleiter by telephone, asking to make an appointment to discuss MCM's services. Leithleiter asked Jordan to call at a later date because Leithleiter had to be out of town at a show for some time.

A week later, while Leithleiter was away, Jordan arrived unannounced at FDC's Chicago office, claiming he had an appointment with Leithleiter. Jordan ended up speaking to another senior FDC employee and may have left an MCM price list. According to FDC, MCM's prices at that time were the same as OG's. (FDC Rule 12(M) Statement of Facts, ¶ 55.) While MCM disputes that (MCM Rule 12(N) Statement, ¶ 66), none of its record citations support its claim that MCM's prices

were lower than OG's in 1991.[2] In addition, MCM admitted in response to A-B's Rule 12(M) Statement that its prices were substantially the same as OG's prior to June 1992. (MCM Rule 12(N) Response, ¶ 20.) A comparison of the price lists of the two companies confirms that fact. (A-B Ex. 7.)

Jordan did contact Leithleiter in May and asked if MCM could supply equipment to FDC for the Consumer Electronics Show at McCormick Place. Leithleiter informed him that FDC had already made arrangements for equipment with AIM and OG.

At the end of May MCM was involved in the move-out of a show that ended just before the Consumer Electronics Show began. As FDC began the set-up for that show, Leithleiter ran into Jordan and observed some of MCM's equipment, which had not yet been removed. Leithleiter learned then from initials stenciled on the equipment that NLT, not MCM, owned it.

About two weeks later Leithleiter received a letter from Jordan, dated June 11, 1991, in which Jordan accused FDC employees of using MCM equipment during the set-up for the Consumer Electronics Show. Jordan enclosed an invoice for equipment rental and gas in the amount of $1,270.20. Although Leithleiter's chance meeting with Jordan at the end of May had

---

[2] MCM cites to pages 22-23, 33-34 and 87 of Leithleiter's deposition in support of its assertion that MCM's prices were lower than OG's in April 199 1. Pages 22-23 address only Aim's prices, pages 33-34 address only First Access' prices, and page 87 addresses MCM's prices in July 1992. It is undisputed that MCM lowered its prices in July 1992.

occurred after the alleged use of MCM's equipment, Jordan had not mentioned the incident at that time.

In a letter dated June 12, 1992, Leithleiter denied Jordan's assertion that FDC employees had used MCM's equipment and refused to pay the invoice. Leithleiter also stated, "If your letter and invoice is indicative of your operation, then I feel FDC will certainly have no need for any type of service from your company in our upcoming shows." (FDC Ex. 7.)

On June 20, 1991, Jordan, acting as MCM's attorney, wrote to Van Ort (whom he identified throughout as "Dale Van ORJ" rather than Doug Van Ort) regarding the alleged incident. The letter accused Leithleiter of unprofessional conduct, called his denial of the incident "disingenuous," and demanded a meeting with Van Ort under threat of litigation. (FDC Ex. 8 at 1-2.) MCM does not dispute that after receiving the letter, Van Ort instructed Leithleiter not to do business with MCM, and both decided based on Jordan's conduct that they were not interested in working with MCM. (FDC Rule 12(M) Statement, ¶¶ 61-62; MCM Rule 12(N) Response, ¶¶ 61-62.) MCM did not contact FDC again for over a year.

On July 21, 1992, Jordan, this time acting as a salesperson for MCM, sent Van Ort a letter and a price list, which reflected a 10% cut in MCM's prices.[3] Based on the lower prices, Van Ort reconsidered his refusal to deal with MCM and passed the letter on to Leithleiter

---

[3] This time Jordan referred to Van Ort as "Doug Van ORJ."

with a note to see him.[4] (FDC Ex. 9.) Then, on August 21, 1992, MCM filed this action against FDC, Leithleiter and Van Ort. MCM did not solicit FDC for business again.

FDC contends that it did not agree or conspire with anyone to use only OG, and it has submitted both Leithleiter and Van Ort's deposition testimony to support that. (FDC Ex. 2 at 83-86; FDC Ex. 3 at 132-34.) It asserts four reasons for refusing to hire MCM: (1) in 1991 MCM's prices were comparable to OG's, so it had no financial incentive to use MCM; (2) MCM was a newcomer in the industry with no track record; (3) MCM was only a broker; and (4) MCM threatened to file a lawsuit against it. (FDC Rule 12(M) Statement, ¶ 67.)

MCM sees things a bit differently. According to it, FDC agreed to use only OG to avoid labor disputes and damage to property based upon its alleged knowledge of union and OG misconduct at McCormick Place. To support that contention, it cites to Leithleiter's deposition at pages 60, 98 and 102-103, as well as the statement of Larson, which has been stricken as inadmissible. (*See* MCM Rule 12(N) Additional Facts, ¶¶ 67, 111.) At page 60, Leithleiter testified only about Jordan's initial communications with FDC in April 1991.

---

[4] MCM asserts that Van Ort instructed Leithleiter to follow up with MCM, which Leithleiter failed to do, citing to page 87 of Leithleiter's deposition. There Leithleiter testified only that Van Ort said he wanted to talk about something; the testimony does not even make clear that Leithleiter was referring to the July 1992 MCM price list. Van Ort testified that he did not ask Leithleiter to contact MCM after receiving the July 1992 price list. (FDC Ex. 2 at 57.)

At the remaining cited pages Leithleiter does discuss a theft of forklifts in which Larson was suspected, but the owner of the forklifts is not identified. MCM does not establish through that testimony that the incident was connected with union and OG misconduct. FDC submitted additional testimony from Leithleiter's deposition that the four stolen forklifts were owned by OG, not FDC. (FDC Reply Ex. I at 96-97.) MCM has submitted no other evidence to support its claim that FDC felt threatened because of its knowledge of past misconduct by Local 714 or OG.[5]

MCM admits that FDC did not receive a year-end discount for using OG exclusively, the arrangement that existed between OG and A-B. It asserts, however, that Leithleiter had known Boscarino for twenty-two years, that they were friends and that on two or three occasions Boscarino gave Leithleiter tickets to concerts at the Rosemont Horizon. It also contends that Leithleiter's brother is a union forklift driver at McCormick Place, a position it claims Leithleiter obtained for him. It asserts that Boscarino was upset when Leithleiter told him that FDC would have to look at a new company (MCM) and that Boscarino wanted FDC to continue

---

[5] Mugnolo testified at his deposition that because Leithleiter and Boscarino were friends, he was sure it had been conveyed to Leithleiter what would happen if FDC did not use OG. (FDC Ex. 4 at 401.) However, he knew of no facts to support his assumption. (*Id.*) MCM also submitted evidence that NLT equipment rented to MCM was intentionally damaged while at McCormick Place, ostensibly by OG. (MCM Rule 12(N) Additional Facts, ¶¶ 76-81.) However, all of the evidence of such incidents is inadmissible hearsay. (*See supra* at 2-4.) In addition, MCM presented no evidence that FDC was aware of those incidents.

using OG. It also contends that Boscarino was the first person Leithleiter contacted after FDC received a copy of the complaint in this case.[6] FDC admits those facts except as to Leithleiter's brother, which it denies because MCM's supporting evidence is inadmissible hearsay. However, FDC disputes MCM's conclusions that the facts evidence an agreement.

MCM also claims that FDC must have had an agreement with OG because it continued to use OG even though MCM's prices were lower and its service was the same or better. It points to various failings on the part of OG, including that OG's equipment sometimes broke down (which caused problems for FDC), that OG overcharged FDC and that OG's equipment was older and of inferior quality. FDC disputes all of those facts. As noted above (*See supra* at 6-7), it is undisputed that MCM's prices were actually the same as OG's until July 1992. FDC has submitted evidence that when it disputed charges on OG invoices, it discussed the matter with OG, asked for new invoices, which OG prepared, and did not pay the disputed charges. (FDC Ex. 3 at 91-94.) FDC has also submitted Leithleiter's testimony that unlike other vendors OG had a mechanic at McCormick Place to repair equipment that broke down and made extra equipment available to prevent work slowdowns. (FDC Ex. 3 at 53.)

Finally, when asked about evidence supporting the allegations of an agreement, Mugnolo testified at his

---

[6] FDC counters that Leithleiter did so because his superiors at FDC were unavailable and that he contacted Boscarino to find out what he knew about the lawsuit. (MCM Ex. EE at 120-23.) In addition, OG and Boscarino were also named as defendants. *See infra* at 15.

deposition that he believed such an agreement must have existed because FDC would not give MCM a chance. (FDC Ex. 4 at 393.) He also testified that FDC, Leithleiter or Van Ort must have met with Hogan regarding such an agreement (as alleged in ¶ 49b of the Fourth Amended Complaint) because FDC did not use MCM. (*Id.* at 416.) He further testified that he believed Boscarino had instructed FDC to issue invoices to OG in May 1992 for the Consumer Electronics Show and in June 1992 for the Photo/Midwest Show and the Supercomm '92 Show simply because OG received such invoices from FDC. (FDC Ex. 4 at 402-03, 405.)

C. A-B

According to MCM, by letter of January 17, 1992, A-B (through Sheridan, its General Manager) agreed to use MCM as A-B's primary supplier of gas scooters during 1992, to have MCM supply half of A-B's equipment needs for the National Restaurant Association Show and the Food Marketing Institute Show, and all of A-B's needs for the "NSGA East Building" and the Siggraph Show. A-B disputes that a binding agreement was reached, characterizing the document as a letter of intent only. (A-B Reply Facts, ¶ 28.) However, A-B did subsequently issue two purchase orders to MCM for equipment.

On February 24, 1992, Boscarino wrote to Sheridan, reminding him of OG's past services and requesting that OG remain A-B's "official" forklift contractor. (MCM Ex. V.) On March 10, 1992, Sheridan wrote to Boscarino, confirming issues discussed at a meeting of Sheridan, Tom Gilmore and Boscarino, and requesting

responses as to certain matters by the end of the month. (MCM Ex. W.) During March, Sheridan and Vince Siciliano also informed Boscarino that AB had agreed to rent equipment from MCM. MCM contends that in response, Boscarino said that Bill (Hogan) wasn't going to like that. It cites to page 22 of Sheridan's deposition in support. However, Sheridan was asked only if he recalled a conversation with Boscarino and Siciliano in which Boscarino had told him that Bill would be upset, and he answered that he did. (MCM Ex. N at 22.) But Sheridan's testimony as to Boscarino's statement is inadmissible hearsay. MCM plainly offers it to prove the truth of Boscarino's statement, for if admissible that statement would help to connect OG and Local 714 and demonstrate their influence over A-B. Because it is inadmissible, however, it cannot be considered in deciding the current motion. *See supra* at 2.

It is undisputed that subsequently Sheridan had a meeting with Hogan and other representatives of Local 714 to discuss forklift rentals at McCormick Place. There Sheridan stated that A-B was not satisfied with OG and would be using MCM for about half of its equipment needs for the National Restaurant Association and Food Marketing Institute shows. Sheridan confirmed that discussion by letter of April 8, 1992, to Hogan. (MCM Ex. Y.) MCM contends that a blind carbon on the letter indicates that Hogan had agreed to labor concessions; A-B disputes that interpretation of the notation. (*Id.*)

At about the same time, Boscarino called Bartlett, saying that OG was being treated unfairly by A-B's agreement with MCM and asking to meet. Bartlett

agreed to meet with Boscarino on his next visit to Chicago. In preparing for that meeting, Bartlett asked Gilmore about outstanding purchase orders and learned that A-B had just issued two purchase orders to MCM for large amounts of equipment for the National Restaurant Association and Food Marketing Institute shows.

The meeting took place on April 17, 1992. Bartlett met first with Hogan and then with Boscarino. On behalf of OG Boscarino offered A-B a 10% discount on total rentals for the year to be paid at the end of the year if A-B used only OG. Bartlett understood that A-B would not receive the discount if it used another supplier. OG also agreed to continue to supply A-B with forklifts for its warehouse at no charge, to provide scooters for trade show management at no charge and to keep its prices at 1991 levels during calendar year 1992.

After the meeting Bartlett instructed Gilmore to cancel the two MCM purchase orders. Gilmore's letter to MCM of April 17, 1992, stated that the purchase orders were being canceled due to an "advance agreement" with OG that neither Gilmore nor Sheridan had known about. (MCM Ex. L.)

Five days later, on April 22, 1992, MCM sued OG, Boscarino, Hogan and others, asserting that they had violated RICO and tortiously interfered with MCM's business by causing A-B to cancel the purchase orders.[7]

---

[7] A-B was not named as a defendant, but its conduct in canceling the MCM purchase orders was a central issue in the case.

(*MCM v. Boscarino, et al.*, Case No. 92 C 2621 (N.D. Ill.).) A-B contends that during a recess in the preliminary injunction hearing held on April 24, 1994, MCM was informed that A-B would no longer do any business with it. MCM disputes that fact, citing the transcript of the hearing to support its contention that part of the subsequent settlement agreement was the understanding that MCM would be permitted to solicit A-B's business on the same footing as any other supplier. (MCM Ex. II.)

In early May 1992, MCM and A-B executed a settlement agreement and release (the "Release"). (A-B Ex. 1.) A-B agreed to perform under the original purchase orders issued to MCM for the National Restaurant Association and Food Marketing Institute shows. In exchange, MCM agreed to release A-B from any and all claims arising from actions taken before April 25, 1992, including those alleged in the complaint in Case No. 92 C 2621, as well as those relating to the two purchase orders and the January 17, 1992, letter to MCM, which were attached as exhibits to the settlement document.

It is undisputed that A-B did perform under the two purchase orders. When MCM invoiced A-B for the equipment used during the two shows, MCM included in the invoice amounts the Chicago rental taxes due. (A-B Ex. 3.) It also separately invoiced A-B for incidental damages to equipment, although, according to A-B, the purchase orders made no mention of damages. (A-B Ex. 4.) MCM contends that it had a legal obligation to collect the rental tax, although A-B disputes that. A-B has submitted evidence that it paid the rental taxes directly to the City of Chicago. (A-B Ex. 5, ¶4.)

MCM also contends that although A-B agreed at the April 24, 1994, hearing to permit MCM to compete fairly for A-B's business, Bartlett refused to meet with Mugnolo or to rent equipment from MCM. A-B disputes the import of what was said at the hearing and asserts that it had no obligation under the Release to do anything more than it did.

A-B did not rent from MCM after June 1992. It is undisputed that from May to July 1992, MCM offered no price concessions to A-B.[8] It is also undisputed that MCM did not solicit A-B's business in 1993. MCM contends that it did not do so because it had received a letter in July 1992 from an attorney representing A-B instructing it to have no further contact with A-B except through counsel. (*See* MCM Ex. DD.) However, GES (into which A-B merged in January 1994) rented from MCM beginning in October 1994 and continuing through 1996.

MCM contends that OG threatened labor disputes against A-B, although it does not identify a time frame or assert that those threats were connected to A-B's efforts to rent from MCM. Moreover, it cites only to the deposition of Tom Jordan to support that contention. (MCM Ex. JJ.) But Tom Jordan's testimony was that he heard about such threats from Gilmore, and as a result it is inadmissible hearsay. And Gilmore testified at his deposition that he had heard no threats against A-B from anyone. (AB Ex. 4, Gilmore Dep. at 81-85.)

---

[8] A-B received the 10% discount from OG as a reduction in the amount of $143,867 on its final invoice of 1992. (A-b Ex. 10, ¶ 10.)

III. Procedural History

MCM brought this action on August 21, 1992, asserting among other things two civil RICO claims, 18 U.S.C. §§ 1962(c) and (d), and antitrust claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as antitrust claims under 15 U.S.C. §§ 14, 18 and 24. On November 11, 1992, MCM voluntarily dismissed Boscarino and OG as defendants.

On July 28, 1994, this Court granted the defendants motions to dismiss under Fed. R. Civ. P. ("Rule") 12(b)(6), dismissing this case with prejudice. MCM appealed as to its claims under Sections I of the Sherman Act and Sections 1962(c) and (d) of RICO, but not as to its claims under Section 2 of the Sherman Act and Section 3 of the Clayton Act. *See MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 969 n. 7 (7th Cir. 1995). The Seventh Circuit reversed in part, concluding that the Sherman Act and RICO claims had been adequately pled, and remanded the case to this Court. *Id.* at 981.

MCM filed its Fourth Amended Complaint on October 31, 1996. It asserts claims under Sections 1962(c) and (d) of RICO (Count 1), Sections I and 2 of the Sherman Act (Count II), Section 3 of the Clayton Act, 15 U.S.C. § 14 (Count III), trespass against only FDC and Leithleiter (Count VI) and violation of the Illinois Consumer Fraud Act and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* ("Consumer Fraud Act") (Count VII). It has withdrawn the claims asserted in Counts IV and V.

Discussion

Fed. R. Civ. P. ("Rule") 56(c) allows the Court to grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In considering the evidence submitted by the parties, we do not weigh it or determine the truth of asserted matters. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). We are to view all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Transamerica Ins. Co. v. South*, 975 F.2d 321, 327 (7th Cir. 1992). "If no reasonable jury could find for the party opposing the motion, it must be granted." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995) (citing *Anderson*, 477 U.S. at 248).

I. Claims Not Appealed

FDC asserts that MCM's claims under Section 2 of the Sherman Act and Section 3 of the Clayton Act are not properly before the Court because MCM failed to appeal the dismissal of the those claims.[9] Both claims were dismissed with prejudice on the defendants' motions to dismiss (*see* 1994 Opinion at 20-22), but MCM did not appeal their dismissal. *See MCM Partners*, 62 F.3d at 969 n.1. MCM has not responded on this issue,

---

[9] FDC does not challenge MCM's assertion of its trespass claim, which was dismissed without prejudice because this Court declined to exercise supplemental jurisdiction over it. Memorandum Opinion and Order of February 16, 1994 (the "1994 Opinion") at 24.

but it has also not offered any substantive argument regarding those claims.

It is axiomatic that a party cannot revive claims on remand that were not raised on appeal. Because MCM did not appeal the dismissal of the two antitrust claims, that dismissal with prejudice stands. This Court has no obligation to entertain claims that have already been dismissed with prejudice. As a result, MCM's claim under Section 2 of the Sherman Act (part of Count II) and its claim under Section 3 of the Clayton Act (Count III) are stricken.

II. MCM's Release of Claims Against A-B

A-B contends that MCM's Sherman Act and RICO claims are barred by the Release.[10] MCM released A-B[11] from all claims:

> arising out of any matter, cause or thing from the beginning of the world to April 25, 1992 including, but not limited to, any and all claims, causes of action, liability or damages arising out of the acts, transactions, contracts, occurrences or events alleged in the pleading filed in the Litigation [Case No. 92 C 2621] and further including, but not limited to, claims and/or allegations allegedly arising from Exhibits I and 2 [the two purchase orders] and the January 17, 1992 Letter attached hereto as Exhibit 3.

---

[10] A-B does not argue that the Consumer Fraud Act claim is barred by the Release.

[11] Because paragraph 5 of the Release includes A-B's officers and employees, it covers Bartlett and Aaron as well. (A-B Ex. 1, ¶ 5.)

(A-B Ex. I ¶ 5.) As consideration for the Release, A-B agreed to rent equipment from MCM for the National Restaurant Association and Food Marketing Institute shows. (*Id.*, ¶ 4.) The Release also states that both parties were represented by counsel in connection with it. (*Id.*, ¶ 6.)

The language of the Release clearly covers MCM's Sherman Act and RICO claims, both of which are based upon the deal A-B worked out with OG on April 17, 1992, and A-B's subsequent cancellation of the purchase orders issued to MCM. Thus, unless the Release is invalid, those claims are barred. MCM contends that because A-B failed to live up to its promise to allow MCM to compete fairly, there was no consideration for the Release and that it is void as against public policy.

MCM asserts that A-B failed to live up to its promise to permit MCM to compete fairly because Bartlett did not meet with MCM or agree to do business with it and because A-B's counsel sent MCM a letter in July 1992 requesting that MCM direct all further communications with A-B to A-B's attorneys. As evidence of the obligation MCM cites only to an excerpt of the transcript of the hearing before this Court on April 24, 1992. When asked if the proposed settlement of MCM's claims in Case No. 92 C 2621 would permit everyone to compete fairly after the two purchase orders had been performed, attorneys for MCM and for OG and certain individual defendants responded in the affirmative. (MCM Ex. II.) But MCM's failed to have that obligation included in the Release itself As a result, MCM's evidence is parole and can be considered only if the Re-

lease is ambiguous, for under Illinois law,[12] if the language of the contract is unambiguous, then we may not consider parole evidence. *Home Ins, Co. v. Chicago & Northwestern Transp. Co.*, 56 F.3d 763, 767 (7th Cir. 1995).[13]

But the Release is not ambiguous. It quite unambiguously required A-B to perform pursuant to the two purchase-orders, and it equally unambiguously released all of MCM's claims in connection with those purchase orders in exchange for A-B's performance. That is what MCM and A-B agreed to do, and according to the evidence that is what MCM has received. To consider MCM's evidence of an earlier parole agreement requiring A-B to do more would be to permit MCM to alter unilaterally the terms of the settlement. MCM agreed to the terms as contained in the Release itself, and it must live with them.

MCM's contention that the Release lacked consideration on A-B's part because A-B had a pre-existing duty to perform under the purchase orders ignores the nature of the dispute between MCM and A-B. Whether A-B had a prior duty under the purchase orders was a contested issue in Case No. 92 C 2621, and A-B gave up its right to dispute that question when it signed the Release. That was sufficient consideration to render the Release valid.

---

[12] The parties both applied Illinois law to the Release. (MCM Mem. at 13; A-B Reply Mem. at 3.)

[13] Moreover, in considering whether the contract is ambiguous, "we may not add another term, about which the agreement is silent, to reach a more equitable result. . . ." *Id.* at 768.

Finally, MCM's claim that the Release is void as against public policy because it releases future antitrust and RICO claims is specious. Regardless of whether MCM's position is legally sound, MCM has asserted no "future" antitrust claims here, for its antitrust claims and RICO are based on A-B's April 1992 conduct, the very same conduct as to which it released A-B. As a result, the Release is not void as against public policy.

In sum, MCM has not demonstrated that the Release is invalid. Because the language of the Release clearly shows that MCM released A-B from all claims based on conduct occurring before April 25, 1992, its Sherman Act and RICO claims against A-B are barred. A-B's motion for summary judgment is granted as to those claims.

III. Sherman Act and RICO Claims Against FDC

FDC raises a number of challenges to MCM's Sherman Act and RICO claims against it, the majority of which we need not address. Essentially, FDC argues that both claims fail because Based MCM has failed to adduce evidence that FDC entered into an agreement or conspiracy with anyone.

A. Section I of the Sherman Act

Section I of the Sherman Act states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. The elements of a Section I claim are "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *MCM Partners*, 62 F.3d at 972 n.7 (quoting *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993)). As to the first element, a plaintiff must submit evidence that "tends to exclude the possibility of independent action by the [defendant]." *Monsanto Co. v. Spray-Rite Serv. Com*, 465 U.S. 752, 768 (1984). "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec, Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). The Seventh Circuit has adopted a multi-step approach to analyzing the sufficiency of a plaintiff s evidence in antitrust conspiracy cases:

> We first review the evidence of conspiracy submitted by the plaintiff. Next, we examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiffs complaint is as compatible with legitimate business activities of the [defendant] as it is with illegal conspiracy. Finally, if we determine that this analysis leaves the evidence of conspiracy ambiguous, we determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

Serfecz v. Jewel Food Stores, 67 F.3d 591, 599 (7th Cir. 1995), *cert, denied*, 116 S. Ct. 1042 (1996) (citing *Market Force, Inc. v. Wauwatosa Really Co.*, 906 F.2d 1167, 1171-72 (7th Cir. 1990)).

Viewing the admissible evidence in the light most favorable to MCM, it has adduced the following circumstantial evidence of a conspiracy involving FDC:

(1) FDC did no business with MCM in 1991 and 1992;

(2) FDC did business with OG in 1991 and 1992;

(3) Leithleiter knew of one incident in which an OG employee participated in a theft of four forklifts that FDC was renting from OG;

(4) Boscarino was the first person Leithleiter called after FDC received a copy of the complaint in this case;

(5) Boscarino became upset when Leithleiter told him that FDC would have to look at a new company;

(6) Leithleiter was a friend of Boscarino's and had received concert tickets from him on two or three occasions;

(7) Leithleiter's brother was a member of Local 714; and

(8) FDC had a collective bargaining agreement with Local 714.

However, MCM has adduced no admissible evidence to support its allegations that FDC ever had an exclusive arrangement with OG (Fourth Am. Compl. at ¶¶ 61-62) or that FDC refused to do business with MCM out of fear of reprisals by Local 714 or OG (Fourth Am. Compl. ¶ 80). MCM has also adduced no admissible evidence that FDC and AB conferred in 1991 regarding

their decisions not to use MCM.[14] (MCM Mem. at 28.) Its contention that its prices were lower than OG's in 1991 has been shown to be without factual basis by both the deposition testimony and the documentary evidence. *See supra* at 6-7. Finally, its assertion that Van Ort *instructed* Leithleiter to contact MCM in July 1992 is contradicted by the relevant document and the deposition testimony of both men. *See supra* at 8 n.3.

In response FDC has submitted evidence that it had four legitimate business reasons for not doing business with MCM:

(1) MCM's prices were the same as OG's in 1991, so there was no financial benefit to using MCM;

(2) MCM was only a broker and did not own its own equipment;

(3) MCM was a newcomer with no proven track record; and

(4) MCM threatened to file a lawsuit against FDC in June 1991.

In addition, it has shown that Van Ort reconsidered that decision in July 1992 when he received MCM's price list showing prices reduced by 10% and asked Leithleiter to see him about it, but that FDC received the papers in this case only a month later.

---

[14] To support that contention, MCM cites to the deposition testimony of Jordan, in which he relates a conversation that allegedly took place between Sheridan and Leithleiter. (MCM Ex. 55 at 123-26.) Jordan's testimony is inadmissible hearsay.

FDC has adequately shown that it exercised its independent business judgment in declining to do business with MCM, for when viewed as a whole the evidence strongly indicates the absence of an illegal conspiracy involving FDC. The evidence does show that Mugnolo and Jordan believed that MCM was entitled to receive business from FDC and others in 1991 even though it was new in the industry and charged the same prices as did its well-established competitor. That expectation was unreasonable. Similarly, MCM's assertions that Leithleiter stuck with OG while failing to meet with Jordan from April to June 1991 and that he failed to contact MCM within a month of FDC's receipt of MCM's new price list in 1992 also show unreasonable expectations. Section 1 of the Sherman Act does not require companies to use any new supplier who comes into the market charging the going rate. As the Seventh Circuit has already stated in this case, "a party may independently decide with whom it will deal, and it may, without running afoul of section 1, decide to direct all of its business to a single supplier." *MCM Partners*, 62 F.3d at 972. And it certainly does not require companies to respond to communications by new suppliers within a certain number of days or else face antitrust liability, as MCM would like. Nothing stopped MCM from charging prices lower than OG's in 1991 to obtain new customers (a move MCM eventually made in July 1992) or refraining from threatening or bringing lawsuits against companies whose business it wanted to obtain (never a wise public relations move). In short, the evidence demonstrates that it was MCM's own conduct, not an illegal conspiracy, that kept it from obtaining FDC's business.

MCM has failed to show that FDC entered into an agreement with anyone to exclude MCM or that FDC's decision not to do business with MCM resulted from anything other than FDC's legitimate business activities. As a result, it has failed to establish one of the elements of its claim under Section 1 of the Sherman Act. FDC's motion for summary judgment is therefore granted as to the remaining portion of Count II.

B. Sections 1962(c) and (d) of RICO

Section 1962(c) makes it illegal for "any person employed by or associated with [an] enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c). Section 1962(d), on the other hand, prohibits a conspiracy to violate any of RICO's other substantive provisions, including Section 1962(c). 18 U.S.C. § 1962(d). Thus, where as here the Section 1962(d) claim alleges a conspiracy to violate Section 1962(c), the existence of an enterprise is essential to both claims.

A RICO enterprise includes "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1961(4). "The hallmark of an enterprise is 'structure.'" *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir.), *cert. denied*, 117 S. Ct. 495 (1996) (quoting *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986)). "A RICO enterprise is 'an

ongoing structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Id.* (quoting *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995)). Moreover, an enterprise must be "an entity separate and apart from the pattern of activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583 (1981).

MCM alleged that the enterprise in this case was an association-in-fact comprised of OG, Boscarino, A-B, FDC, Hogan and Local 714. (Fourth Am. Compl. ¶ 23.) But, as discussed in connection with the Sherman Act claim, there is no admissible evidence that FDC entered into an agreement with anyone regarding MCM or that FDC refused to deal with MCM on the basis of anything other than its independent business judgment. A company acting alone for legitimate business purposes is neither "joined in purpose" with others nor part of a group "organized in a manner amendable to hierarchical or consensual decision-making." *See Rogers*, 89 F.3d at 1337. Because the evidence demonstrates that MCM cannot prove the existence of an association-in-fact enterprise that included FDC, FDC is entitled to summary judgment on the RICO claims in Count I.

IV. State Law Claims

MCM has also asserted a state common law claim of trespass against FDC and Leithleiter (Count VI) and a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*, against A-B, Bartlett and Aaron (Count VII). Both defendants argue that these claims should be dismissed because

they remain before this Court only under our supplemental jurisdiction. (FDC Mem. at 2 n.2; A-B Mem. at 31.)

MCM's Sherman Act and RICO claims were the basis of our subject matter jurisdiction. Its state law claims are indeed before us only under our supplemental jurisdiction. 28 U.S.C. § 1367(a). We have discretion either to retain or dismiss them. 28 U.S.C. § 1367(c)(3); *see also NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir.), *cert. denied*, 115 S. Ct. 2249 (1995). Where all federal claims are dismissed before trial, we should generally dismiss the supplemental claims. *Wright v. Associated Ins. Cos., Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). Although this case is at the summary judgment stage, the discovery and the legal analysis undertaken by the parties in connection with these claims would not have to be duplicated if the claims are re-filed in state court. And, only a limited number of the facts at issue in this action relate to those two claims, so the state court would not have to familiarize itself with the entire record of the case here. There is also no compelling reason for this Court to retain jurisdiction. As a result, we dismiss Counts VI and VII without prejudice to their refiling in state court.

Conclusion

For the reasons set forth above, this Court grants the motions for summary judgment of the defendants as follows:

1. Both MCM's claim under Section 2 of the Sherman Act in Count II and Count III in its entirety are

stricken as improperly brought because MCM failed to appeal this Court's previous dismissal of those claims with prejudice;

2. Summary judgment is granted to all defendants on Count I and the remainder of Count II (Section I of the Sherman Act);

3. Counts IV and V have been withdrawn by MCM; and

4. Counts VI and VII are dismissed without prejudice to their refiling in state court. This order is final and appealable.

ENTER:

/s/ Paul E. Plunkett
UNITED STATES DISTRICT JUDGE

DATED: May 28, 1997

App. 45

[Dated May 28, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 92 C 5641

MCM PARTNERS, INC.,

Plaintiff,

vs.

ANDREWS-BARTLETT ASSOCIATES, INC., d/b/a ANDREWS-BARTLETT EXPOSITION SERVICES, et al.,

Defendants.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants motions for summary judgment are granted as follows: 1. Both MCM's claim under Section 2 of the Sherman Act in Count II and Count III in its entirety are stricken as improperly brought because MCM fails to appeal the Court's previous dismissal of those claims with prejudice; 2. Summary judgment is granted to all defendants on Count I and the remainder of Count II (Section 1 of the Sherman Act); 3. Counts IV and V

have been withdrawn by MCM; and 4. Counts VI and VII are dismissed without prejudice to their refiling in state court. This order is final and appealable.

May 28, 1997
Date

Michael W. Dobbins
Clerk

/s/ Theresa B. Kinney
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 28, 1999

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, Jr., Circuit Judge
Hon. JOEL M. FLAUM Circuit Judge

No. 97-2610

MCM PARTNERS, INCORPORATED,

Plaintiff-Appellant,

v.

ANDREWS-BARTLETT & ASSOCIATES, INCORPORATED, doing business as ANDREWS-BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5641—Paul E. Plunkett, *Judge*.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 1, 1998 by petitioner-appellant, no judge in active service has requested a

vote thereon and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
JUN 29 1999
CLERK

No. 98-1743

IN THE

Supreme Court of the United States

MCM PARTNERS, INC.,

Petitioner,

v.

ANDREWS - BARTLETT & ASSOCIATES, INC., d/b/a ANDREWS - BARTLETT EXPOSITION SERVICES, HAROLD (Butch) BARTLETT, BONNIE AARON and GES EXPOSITION SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. EKLUND
Counsel of Record
CRAIG L. MOORE
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

JEFFREY M. CAREY
10 South LaSalle Street, Suite 3300
Chicago, Illinois 60603
(312) 251-2342

Attorneys for Respondents

153669

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

1. Whether the court below correctly affirmed summary judgment on Petitioner's antitrust and RICO claims, which were based on conduct predating a valid and enforceable Release between the parties, where Petitioner failed to offer admissible evidence that Respondents did anything that violated the antitrust laws or RICO after the effective date of the Release.

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

STATEMENT PURSUANT TO RULE 29.6

Viad Corp. is publicly-traded over the New York Stock Exchange and is the parent company of Respondent GES Exposition Services, Inc. ("GES") and directly or indirectly owns greater than 10% of its stock. Respondent Andrews Bartlett & Associates, Inc. is a wholly owned subsidiary of GES.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. Procedural Background	1
1. The Parties	1
2. The Alleged Conspiracy	2
3. The First Lawsuit and the "Release"	2
Reasons for Denying the Writ	6
I. Neither The Release Nor The Decision Below Enforcing The Release Violates Public Policy	7
A. The Release Is Enforceable And Does Not Bar Claims For Future Conduct — Only Claims Based Upon Conduct That Occurred Before April 24, 1992.	7

Contents

Page

B. The Seventh Circuit's Decision Does Not Violate Public Policy. 8

C. MCM's Reliance Upon *Zenith* Is Misplaced. 9

D. The Seventh Circuit's Decision Dismissing MCM's RICO Claims Was Proper. 12

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Baker v. Chagrin Valley Medical Corp., 1985-1 Trade Cas. (CCH) ¶ 66,622 (N.D. Ohio 1985), *appeal dism'd*, 779 F.2d 49 (6th Cir. 1985) 12

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 9

David Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981) 11

Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217 (7th Cir. 1993) 9

Kaw Valley Elec. Co-op Co. v. Kansas Elec. Power Co-op, Inc., 872 F.2d 931 (10th Cir. 1989) 11

Main Line Theaters, Inc. v. Paramount Pictures Film Distributing Corp., 298 F.2d 801 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962) 8

Marketing Assistance Plan v. Assoc. Milk Producers, Inc., 338 F. Supp. 1019 (D.C. Tex. 1972) 8

Murphy v. S.M. Delaware, Inc., 95 Ill. App. 3d 562, 420 N.E.2d 456 (1981) 7

Cited Authorities

Page

Oberweis Dairy, Inc. v. Associated Milk Producers, Inc., 568 F. Supp. 1096 (N.D. Ill. 1983) 8

Redel's, Inc. v. General Electric Co., 498 F.2d 95 (5th Cir. 1974) 8

SJ Advanced Technology & Mfg. Corp. v. Junkunc, 627 F. Supp. 572 (N.D. Ill. 1986) 11, 12

Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3rd Cir. 1975) 8

Zenith Radio Corp. v. Hazeltine Research, Inc., 410 U.S. 321 (1970) 9, 10, 11

Statutes:

15 U.S.C. § 1 4

15 U.S.C. § 2 4

15 U.S.C. § 14 4

15 U.S.C. § 18 ..... 4, 5

15 U.S.C. § 24 ..... 4, 5

18 U.S.C. § 1962(c) 4

18 U.S.C. § 1962(d) 4

Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §§ 505/1 *et seq.* 5

STATEMENT OF THE CASE

A. Procedural Background

This appeal concerns claims Petitioner MCM Partners, Inc. ("MCM") brought against Respondents Andrews-Bartlett & Associates, Inc. ("AB"), Harold O. Bartlett ("Bartlett"), Bonnie Aaron ("Aaron"), and GES Exposition Services, Inc. ("GES"). The claims were based upon an alleged April 1992 conspiracy between Respondents and certain other individuals. The conspiracy allegedly had the effect of excluding MCM from the business of renting equipment at a trade show and convention facility located in Chicago, Illinois in violation of federal antitrust laws and RICO.

1. The Parties

MCM and the Respondents are not competitors. To the contrary, MCM filed this action to recover in excess of $4 million dollars from two of its best customers — AB and GES. AB was a nationwide exhibition contractor that produced trade shows and conventions at McCormick Place in Chicago and other locations. In 1994, AB merged with GES. Prior to the merger, Bartlett served as AB's President; Aaron was a shareholder and employee. After the merger, Bartlett and Aaron served as employees of GES. In conducting business in the Chicago area, AB and GES rented forklifts and other material handling equipment from a variety of suppliers.

MCM supplied material handling and personnel moving equipment to trade show contractors at McCormick Place. MCM did not own its own equipment, but instead served

as a broker, providing its customers with equipment it rented from National Lift Truck. MCM's sole shareholder, officer, and employee was Frank Mugnolo. Terrence Jordan ("Jordan"), MCM's attorney in this action and in prior actions, worked as a commissioned sales person for MCM.

One of MCM's competitors was O.G. Services, Inc. ("OG"), which supplied material handling and personnel moving equipment for trade shows and conventions at McCormick Place and other locations. OG owned most of the equipment it provided, although it occasionally rented additional equipment to fill large orders.

2. The Alleged Conspiracy

On April 17, 1992, Bartlett met with Nick Boscarino ("Boscarino"), who was affiliated with OG, for the first and only time. At the meeting, Boscarino agreed on behalf of OG that, if AB rented equipment solely from OG in 1992, OG would repay to AB at the end of the year 10 percent of OG's billings for equipment. By letter dated April 17, 1992, AB canceled two purchase orders previously issued to MCM for part of AB's equipment needs at two upcoming shows, the Food Marketing Institute ("FMI") and National Restaurant Association ("NRA") trade shows, which had been scheduled to be held at McCormick Place in May 1992 (the "Purchase Orders").

3. The First Lawsuit and the "Release"

Five days after receiving the cancellation letter, MCM sued OG, Boscarino, and others — but not AB, Bartlett, Aaron, or GES — alleging they violated RICO by conspiring to exclude MCM as a competitor in the rental equipment

market at McCormick Place and tortiously inferred with MCM's business. *MCM Partners, Inc. v. Nick Boscarino, et al.*, 92 C 2621 (N.D. Ill). On April 24, 1992, a hearing was held on MCM's motion for preliminary injunction. Jordan, as an authorized agent of MCM and MCM's attorney, testified at the hearing. During the hearing, an agreement was reached to resolve the claims in the action, and MCM dismissed its case.

Subsequently, on or about May 5, 1992, MCM and AB executed a Settlement Agreement and Release (the "Release"). Jordan was authorized to and did sign the Release on behalf of MCM. Bartlett signed the Release on behalf of AB. Both parties were represented by counsel.

Pursuant to the terms of the Release, AB agreed to perform under the Purchase Orders. In exchange, MCM agreed to release AB, its officers, its employees, successors, and other related parties from any and all claims arising from any matters occurring before April 25, 1992, including those alleged in the Complaint in the first lawsuit, as well as those relating to the Purchase Orders and the April 17, 1992 cancellation letter to MCM. Paragraph 5 of the Release provides, in pertinent part, as follows:

> . . . M.C.M. . . . hereby releases and forever discharges Andrews-Bartlett . . . from any and all claims, controversies, actions, demands, causes of action, debts, obligations, damages, liabilities, duties, contracts or insurance policies of every kind and description, whether known or unknown, and whether at law or in equity, which M.C.M. now has, has had, or hereafter may have against [Andrews-Bartlett] *arising out*

> *of any matter, cause or thing from the beginning of the world to April 25, 1992. . . .*

(Release, ¶ 5) (emphasis added).[1]

AB and MCM performed pursuant to the Purchase Orders. AB rented equipment from MCM for the FMI and NRA shows and paid the rental charges on all of it. In fact, AB's total payment to MCM for the FMI and NRA shows was approximately $160,000 — nearly $50,000 more than the amount set forth in the Purchase Orders. Although MCM did not solicit AB's business in 1993, GES rented from MCM in 1994 and continuing through 1996. (*MCM Partners, Inc. v. Andrews-Bartlett, Inc.*, No. 92 C 5641, slip op. at 16-17 (N.D. Ill. May 29, 1997); App. at 30).

Nearly four months after settling and dismissing the first lawsuit, MCM filed a second lawsuit based upon the alleged April 17, 1992 conspiracy — this time against the Respondents, OG, Boscarino, and others. In its Complaint, MCM alleged violations of RICO (18 U.S.C. §§ 1962(c) and (d)), the Sherman Act (15 U.S.C. §§ 1 and 2) and the Clayton Act (15 U.S.C. §§ 14, 18, and 24). MCM subsequently filed a Second Amended Complaint, which the Respondents and other defendants moved to dismiss. The District Court granted those motions, and MCM appealed the decision to the Seventh Circuit. The Seventh Circuit reversed the District Court's dismissal, in part, holding only that MCM's remaining claims had been adequately pleaded, not that they could be proven. *MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 62 F.3d 967, 981 (7th Cir. 1995).

---

1. On its face, the Release does not apply to conduct or acts by the Respondents that occur after April 25, 1992.

Discovery commenced upon remand, and MCM amended its Complaint several times to: (1) withdraw claims under the Clayton Act, 15 U.S.C. §§ 18, and 24; (2) add a count based upon alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS §§ 505/1 *et seq.*; and (3) to conform its allegations to changes in facts and the identities of parties, including the addition of GES as a defendant.

On February 19, 1997, Respondents filed a motion for summary judgment arguing that, as a matter of law, the Release barred MCM's claims and, alternatively, that MCM lacked evidence to support its antitrust, RICO, and state law claims. In response to the motion for summary judgment, MCM set forth several fact-based arguments challenging the validity and enforceability of the Release. MCM's arguments were based upon evidentiary materials attached to the brief. MCM argued that the Release lacked consideration because AB failed to live up to a promise to permit MCM to compete fairly for future business. (*MCM Partners, Inc. v. Andrews-Bartlett Associates, Inc.*, No. 92 C 5641, slip op. at 20 (N.D. Ill. May 29, 1997); App. at 34). In addition, MCM argued that the terms of the Release violated public policy because they released future antitrust and RICO claims. (*Id.* at 21; App. at 36).

On May 28, 1997, the District Court granted Respondents summary judgment. The District Court ruled that much of the evidence MCM offered was inadmissible under the Federal Rules of Evidence and had been offered in a way that did not comply with the Federal Rules of Civil Procedure. (*Id.* at 2-6; App. at 13-17). The District Court rejected MCM's substantive arguments and dismissed MCM's claims. The Court held that the Release was valid

and enforceable and barred MCM's claims based upon pre-Release conduct. (*Id.* at 21; App. at 35-36). In addition, the District Court rejected MCM's argument that the Release violated public policy. According to the Court, MCM's substantive argument was "specious" because MCM's antitrust and RICO claims were based on AB's April 1992 conduct. (*Id.* at 21; App. at 36).

MCM subsequently appealed the District Court's decision to the Seventh Circuit, but not its evidentiary rulings. The Seventh Circuit affirmed the dismissal of MCM's claims and held that "MCM's claims based on pre-Release conduct [were] barred, and MCM fail[ed] to present any evidence of post-Release violations." (*MCM Partners, Inc. v. Andrews-Bartlett & Assoc., Inc.*, 161 F.3d 443, 449 (7th Cir. 1998); App. at 10). On January 28, 1999, MCM filed a petition for rehearing *en banc*, which the Seventh Circuit denied. (App. at 47-48).

REASONS FOR DENYING THE WRIT

There is absolutely no reason for this Court to exercise its discretion to review this case. The Seventh Circuit's decision is merely that the Release bars Petitioner's antitrust and RICO claims grounded on events that occurred before the Release. There is nothing remarkable about that holding or the lower court's analysis. They are consistent with the decisions of this Court and other courts of appeal, and none of the cases Petitioner cites demonstrates otherwise. The notion that the lower court's decision somehow offends public policy is wholly unfounded, since it has no application to future antitrust or RICO violations.

I.

NEITHER THE RELEASE NOR THE DECISION BELOW ENFORCING THE RELEASE VIOLATES PUBLIC POLICY

A. The Release Is Enforceable And Does Not Bar Claims For Future Conduct — Only Claims Based Upon Conduct That Occurred Before April 24, 1992.

The Release does not bar claims for future antitrust or RICO violations. Nor does the Seventh Circuit's ruling have that effect. On its face, the Release applies to Respondents' conduct that occurred before April 25, 1992. As set forth in the Release, MCM discharged AB from claims "*arising out of any matter, cause or thing from the beginning of the world to April 25, 1992.*" (Release, ¶ 5) (emphasis added). Under Illinois law, a release of all claims that a party has "on account of any matter, cause or thing, whatsoever, from the beginning of the world" to a date certain bars that party from making claims against the released party based upon acts that occurred before the release. *Murphy v. S.M. Delaware, Inc.*, 95 Ill. App. 3d 562, 565-66, 420 N.E.2d 456, 459-60 (1981). The application of this rule to this case means that MCM released the Respondents from any claims — including antitrust and RICO claims — based upon conduct that occurred before April 25, 1992. Accordingly, because the Release does not bar claims based upon post-Release violations, the Seventh Circuit's decision was proper, and the Petition should be denied.

B. The Seventh Circuit's Decision Does Not Violate Public Policy.

Contrary to MCM's claims, the Seventh Circuit's decision does not apply the Release to discharge Respondents from liability for post-Release conduct. Nor does the Seventh Circuit's decision encroach upon the prior decisions of other circuit and district courts. *See e.g. Three Rivers Motors Co. v. Ford Motor Co.*, 522 F.2d 885, 895-98 (3rd Cir. 1975); *Redel's, Inc. v. General Electric Co.*, 498 F.2d 95 (5th Cir. 1974); *Main Line Theaters, Inc. v. Paramount Pictures Film Distributing Corp.*, 298 F.2d 801, 803 (3d Cir.), *cert. denied*, 370 U.S. 939 (1962); *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 568 F. Supp. 1096, 1099 (N.D. Ill. 1983); and *Marketing Assistance Plan v. Assoc. Milk Producers, Inc.*, 338 F. Supp. 1019 (D.C. Tex. 1972). Instead, the Seventh Circuit's dismissal of MCM's claims resulted because MCM failed to offer admissible evidence of actionable, post-Release conduct by Respondents. (App. at 9-10).

The Seventh Circuit properly and simply dealt with MCM's argument that the Release would operate to bar claims of a continuing conspiracy. After conducting its *de novo* review of the District Court's decision and analyzing the record in the light most favorable to MCM, the Seventh Circuit found that MCM not only had not *proven* a continuing conspiracy, but had failed utterly to "allege any facts which would establish a new agreement *or* even an affirmation of the 1992 agreement." (App. at 5, 9) (emphasis added). In other words, the "important federal question" MCM posits (Petition at 7) is a red herring. The Seventh Circuit correctly required, but found lacking, evidence of any post-Release conduct that could be actionable either as a new agreement or a continuation of a prior agreement.

Regardless of whether MCM alleged a new or continuing conspiracy, it had to present evidence of each element of a Section I claim. To state a claim under Section I, a plaintiff must establish "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) an accompanying injury." *MCM Partners, Inc. v. Andrews-Bartlett, Inc.*, 62 F.3d 967, 972 n.7 (7th Cir. 1995), *quoting*, *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993). Clearly, without an actionable agreement upon which to base its Section I claims, MCM is unable to fulfill the basic Sherman Act Section I requirement of a "contract, combination or conspiracy." *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) (a Section I claim requires concerted conduct by (an agreement between) more than one entity: i.e., "contract, combination . . . or conspiracy").

Thus, MCM's argument is properly seen as an effort to secure a right to sue for the future consequences of conduct that pre-dated the Release in which MCM unambiguously surrendered those claims. To allow MCM to proceed would render the Release at issue here, and any other effort to settle antitrust claims, meaningless.

C. MCM's Reliance Upon *Zenith* Is Misplaced.

MCM's resort to a statute of limitations analogy similarly is unavailing. (Petition at 8-10). MCM relies primarily on this Court's decision in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 410 U.S. 321 (1970). In *Zenith*, this Court held as follows:

> Generally, a cause of action accrues and the statute begins to run when a defendant commits

> an act that injures a plaintiff's busine
> *the context of a continuing conspiracy* ss . . . *In*
> the antitrust laws, . . . each time a plo violate
> injured by an act of the defendants aaintiff is
> action accrues to him to recover the cause of
> caused by that act and that, as to those damages
> the statute of limitations runs flamages,
> commission of the act. rom the

Id. at 338 (emphasis added).

At most, *Zenith* simply stands for the pr
in order to have an antitrust claim, a plaint
two things (at least): (1) an illegal agreeme
injury it causes. So long as ascertainable
within the statute of limitations period, the p
to redress it.

opposition that,
ff must prove
nt; and (2) an
injury occurs
aintiff can sue

The *Zenith* holding is inapposite to M
for several reasons. First, unlike Zenith, M
present evidence of a continuing conspiracy.
The fundamental factual basis for the *Zenith*
absent here.

CM's Petition
MCM failed to
(App. at 5, 9).
holding is thus

Second, *Zenith* addressed the effec
limitations has on *when* a party could asser
on *an otherwise actionable* agreement. Here,
on which MCM bases its claims is *not* acti
released Respondents from any liability bas
purposes of assessing MCM's claims, th
agreement does not exist. Zenith had a
agreement and an injury suffered more than
it was made. MCM may have suffered an i
Release, but it lacks an actionable agreeme
to base a claim. This deficiency was fatal to

a statute of
claims based
the agreement
onable; MCM
d upon it. For
pre-Release
n actionable
our years after
jury after the
t upon which
MCM's claim.

This Court's treatment of other issues in *Zenith* plainly refutes MCM's present arguments. HRI, the antitrust defendant in *Zenith*, argued that Zenith's antitrust claim for damages, which accrued in 1959 through 1963, was barred by a release executed in 1957. The release, HRI argued, rendered Zenith unable to recover on its antitrust claim based on conspiratorial conduct occurring prior to the 1957 release — even for future damages caused by pre-release conspiratorial acts. This Court rejected HRI's argument because, while HRI's alleged co-conspirators were identified in the release as parties covered by the release, HRI was not. *Zenith*, 401 U.S. at 342-43. Accordingly, HRI was not entitled to the benefit of the release. *Id.* at 347-348.

Conspicuously absent from this Court's decision, however, is any suggestion that the release would have been ineffective as to HRI had HRI been a party to it. In fact, this Court clearly suggested that the release *was* effective as to HRI's alleged co-conspirators who were parties to it. 410 U.S. at 347-48. Here, there is no question that MCM is a party to the Release.

Absent an actionable agreement, *Zenith's* holding cannot provide any support for MCM's position. MCM tries to fill this void with, and bases its entire "public policy" argument on incantations of "continuing conspiracy." Yet the Seventh Circuit found nothing in the record to support such a claim. That ruling is amply supported by federal decisions. *See, e.g., Kaw Valley Elec. Co-op Co. v. Kansas Elec. Power Co-op, Inc.*, 872 F.2d 931 (10th Cir. 1989); *David Orgell, Inc. v. Geary's Stores, Inc.*, 640 F.2d 936 (9th Cir.), *cert. denied*, 454 U.S. 816 (1981); *SJ Advanced Technology & Mfg. Corp. v. Junkunc*, 627 F. Supp. 572

(N.D. Ill. 1986); *Baker v. Chagrin Valley Medical Corp.*, 1985-1 Trade Cas. (CCH) ¶ 66,622 (N.D. Ohio 1985), *appeal dism'd*, 779 F.2d 49 (6th Cir. 1985).

D. The Seventh Circuit's Decision Dismissing MCM's RICO Claims Was Proper.

MCM also makes a half-hearted argument for reversal of summary judgment against it on its RICO claim. Summary judgment of that claim was mandated by, among other things, MCM's agreement to the Release. MCM's contention that RICO violations arose each time AB contracted with OG is unsupported by any statute, case law, or reason. (Petition at 10). Indeed, as the Seventh Circuit properly noted, so called "predicate acts" are just one of four elements of a RICO claim, and "[t]he facts in the record do not support a finding of a post-Release violation of RICO." (App. at 10). MCM gave up its antitrust and RICO claims based on pre-April 25, 1992 conduct when it executed the Release. MCM offered no evidence to establish that the elements of either claim existed after that date. MCM remains bound by the Release and this Court should not countenance MCM's efforts to ignore its contract.

CONCLUSION

The Seventh Circuit's decision affirming summary judgment in the Respondents' favor on MCM's antitrust and RICO claims was proper and in accordance with applicable law. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. EKLUND
Counsel of Record
CRAIG L. MOORE
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
(216) 622-8200

JEFFREY M. CAREY
10 South LaSalle Street, Suite 3300
Chicago, Illinois 60603
(312) 251-2342

Attorneys for Respondents